East Wind Enterprises *and* Graphic Arts International Union, Local 280. Case 20–CA–14788

27 January 1984

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 4 August 1983 Administrative Law Judge Clifford H. Anderson issued the attached supplemental decision. The Employer filed exceptions and a supporting brief on 23 September 1983, and the General Counsel filed an answering brief on 19 October 1983.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the supplemental Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, East Wind Enterprises, San Francisco, California, its officers, agents, successors, and assigns, shall take the action set forth in the recommended Order.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge: On March 27, 1980, Administrative Law Judge Jerrold H. Shapiro issued his decision in Case 20–CA–14788. The Board adopted the judge's recommended Order on July 17, 1980,[1] and the United States Court of Appeals for the Ninth Circuit enforced that Order on December 4, 1981.[2] That Order, inter alia, required the Respondent to make Leonard Gerard (the backpay claimant or the claimant):

> . . . whole for any loss of earnings he may have suffered by reason of the discrimination against him, by payment of a sum of money equal to that which he would have earned from the date of his unlawful termination, less his net earnings, if any, during such period, to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950). Interest on the backpay shall be computed as set forth in the Board's decision in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

A dispute having arisen over the amount of backpay due the claimant under the Order, on May 18, 1982, the Regional Director for Region 20 of the National Labor Relations Board issued a backpay specification and notice of hearing. On January 13, 1983, Associate Chief Administrative Law Judge William J. Pannier ruled on preliminary motions and granted a postponement of the hearing until February 7, 1983. I heard the matter in trial on February 7, 8, and 22, and March 9 and 10, 1983, in San Francisco, California. Thereafter, the General Counsel and Respondent filed posthearing briefs.

FINDINGS AND CONCLUSIONS

Based on the record as a whole, including my observation of the witnesses and their demeanor and the posthearing briefs of the Respondent and the General Counsel, I make the following findings and conclusions.

I. ISSUES

The parties were not in dispute regarding the appropriate backpay period—essentially a 1-year period beginning August 6, 1979, and ending August 14, 1980. The parties disagreed, however, regarding: (1) the formula for calculating the gross backpay amount, (2) the backpay claimant's mitigation of damages during the period and, finally, (3) the issue of pension payments. These issues are treated separately, infra.

II. THE GROSS BACKPAY FORMULA AND AMOUNT

A. *The Contentions of the Parties*

The General Counsel utilized as a measure of the claimant's backpay during the backpay period the wages he earned before his termination. Thus, the General Counsel advances Gerard's prior earnings in 1979 as a measure of the earnings he would have obtained after his discharge had he remained in the Respondent's employ. The Respondent did not dispute the accuracy of the calculations of the General Counsel in determining the claimant's earnings in the predischarge period but vigorously opposed any formula which used the pretermination period as a measure of posttermination earnings. Rather the Respondent argued that the measure of gross backpay due should be taken from the work that would have been assigned Gerard during the backpay period itself.

The General Counsel's compliance agents testified and the record otherwise agreed that examination of the hours and earnings of other employees most comparable to the backpay claimant, particularly employee Hughs, showed substantial amounts of employee overtime. Such wage data produces a gross wage for the claimant which is unordinarily high when compared to the claimant's pretermination earnings. Thus, the agents testified that in the interest of fairness the period before the claimant's discharge was used to obtain representative wage and employment figures which figures were then utilized in calculating the claimant's gross backpay. The Respondent did not dispute this testimony so much as challenge the relevance of it. The Respondent argues that since work conditions changed soon after the claimant's dis-

[1] 250 NLRB 685 (1980).
[2] 664 F.2d 754 (9th Cir. 1981).

charge, neither the wages and hours of other employees during the backpay period nor the wages and hours of the backpay claimant before the discharge should be used to determine his gross backpay. Rather, the Respondent argues, the work that was in fact done by the Respondent's employees during the backpay period should be examined and those portions that would have been done by the backpay claimant, had he remained in the Respondent's employ, should be used to calculate the total work and earning would have been paid the claimant for the relevant period.

The Respondent argued that the end of the second shift, the technological changes in machines at the facility and changing types of work done, all contributed to a substantial reduction in the quantity of work which would have been assigned to the backpay claimant had he remained working during the backpay period. Thus, in the Respondent's calculations, the backpay claimant would have worked approximately 70 days during the backpay year. This total was based on testimony adduced by the Respondent concerning the various printing jobs undertaken during the backpay year and that portion of each job which the backpay claimant would have been assigned in the normal course. The Respondent did not deny that other department employees worked significantly longer hours but rather claimed those hours were a result of those workers' different skills and abilities as compared to the claimant.

Counsel for the General Counsel argued with equal vigor in favor of her predischarge hours worked formula. She also argued strenuously that the formula proposed by the Respondent was both impossible of realistic calculation and, as applied by the Respondent to the claimant, produced an inequitable and distorted gross backpay amount which could not be suppported by a fair reading of the evidence. The General Counsel initially noted that the original decision herein held that the end of the second shift by the Respondent was an illegal act. Counsel for the General Counsel additionally disputed the testimony of the Respondent's witnesses regarding that work the backpay claimant would have been assigned during the backpay period. Thus, for example, the backpay claimant testified that he had worked on job assignments using certain types of printing equipment while the Respondent's witnesses either disagreed with this testimony or questioned the size or number of such assignments completed by the claimant. Fundamentally the General Counsel attacked the Respondent's assertions as mere post hoc opinions of what work would have been undertaken by the backpay claimant. The General Counsel argued such determinations are essentially impossible to initially ascertain or to verify and, by their very nature, involve simplifying assumptions which were abused by the Respondent in its calculations.[3] The General Counsel also argues that the result of the calculations of the Respondent produces an essentially absurd result, i.e., that at the time of the claimant's discharge other employees suddenly increased their hours throughout the backpay period while the backpay claimant would have suffered a substantial and lasting reduction in his hours. Other department employees were admittedly working overtime while the backpay claimant under the Respondent's formula would have been reduced to a fraction of his former hours.

B. *Analysis and Conclusion*

An administrative law judge considering conflicting backpay formula arguments must determine the most accurate method of determining backpay amounts. *J. S. Alberici Construction Co.*, 249 NLRB 751 (1980); *American Mfg. Co. of Texas*, 167 NLRB 520 (1967). Coupled with this obligation, however, is the fundamental notion that uncertainties will be assessed against the wrongdoer. *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569 (5th Cir. 1966). Thus, the Board has rejected theoretical formulas for determining backpay offered by respondents which, while internally consistent, did not reflect the realities of the events involved. See, e.g., *Fruin-Colnon Corp.*, 244 NLRB 510 (1979). It follows that I should carefully consider the proposed formulas and calculations offered by each party and determine what formula and what calculations produce the most accurate gross backpay amount, keeping in mind that uncertainties must be resolved against the respondent whose illegal conduct in terminating the backpay claimant produced both the uncertainties at issue and the injury the instant litigation is intended to remedy.

The type of backpay formula proposed by the General Counsel is both conventional and noncontroversial.[4] The Board's Casehandling Manual, Part Three, Compliance Proceedings, section 10538 et seq. describes four gross backpay formulas for use in backpay calculations. Two are based on the discriminatee's hours of earnings prior to his or her discharge. Two are based on the earnings of hours of representative employees or replacement employees who worked during the backpay period. The uncontested testimony of the compliance agents herein reveals that reliance on employee's hours or earnings during the backpay period, i.e., the latter two formulas, would produce a gross backpay sum which would be larger than that obtained using the discriminatees' own hours and earnings preceding the discharge. Thus, there seems to be no dispute that the General Counsel selected a formula which, from among the four formulas noted, is most favorable to the Respondent. It is also true that the General Counsel's projected earning formula has met with court approval. E.g., *Bagel Bakers Council of Greater New York*, 555 F.2d 304 (2d Cir. 1977); *Charley Toppino & Sons, Inc.*, 358 F.2d 94 (5th Cir. 1966). Thus the General Counsel has clearly taken a traditional position based on a court approved formula which is both con-

[3] Thus the General Counsel argued the Respondent's witnesses assumed that the backpay claimant did not possess the qualifications or interest in undertaking certain work at the plant and that this lack of qualifications or interest would have continued unabated through the backpay year. The General Counsel asserts it is far more likely that, were the backpay claimant working fewer hours than his colleagues because he refused to learn certain tasks, as the Respondent asserts, he would soon have shown greater interest in doing or learning to do whatever was necessary to work more hours.

[4] See, e.g., *Chef Nathan Sez Eat Here*, 201 NLRB 343, 345 (1973), where the Board labels an actual earnings formula "the most fair, suitable, and equitable formula to employ and should not be departed from in the absence of special circumstances not present here."

ventional, and when considering the four alternative, most favorable to the Respondent.

The General Counsel's projected earnings formula for gross backpay substitutes the readily ascertainable hours and earnings of the claimant before his discharge for the often difficult to ascertain and essentially abstract notion of what hours and/or earnings the claimant would have enjoyed had he remained in the Respondent's employ during the backpay period. As noted above, it is clear that the total backpay amount resulting from this calculation is less than would have resulted had other employees' hours or earnings during the backpay period been utilized. The Respondent proposed an entirely different formula based on a quantification of the work done during the backpay period which, it argues, would have been performed by the backpay claimant. The litigation of the specifics of this formula as applied to the backpay claimant occupied the bulk of the trial. The General Counsel, as noted, disputed both the validity of the Respondent's formula and its application herein, i.e., she disputed the Respondent's claims as to what work would have been assigned the claimant.

The Respondent's formula, in theory, is a better formula for calculating gross backpay than the General Counsel's. By definition it measures exactly the work for which the backpay claimant would have been paid. Such a formula, however, is more easily stated than quantified and obviously presents complications in its application to the claimant's specific situation. The litigation of the specific application of the formula to the instant case convinces me that the necessarily complicated and opinion laden assumptions regarding what work would have been performed by the backpay claimant as opposed to other employees during the backpay period makes the Respondent's formula, under either the General Counsel's or the Respondent's view of the facts, less accurate than the proposed formula of the General Counsel.

The uncertainties or speculations implicit in the assertions of the Respondent which render its proposed application of the backpay formula unsatisfactory are numerous. Initially, as noted above, the Respondent assumes that the claimant would be satisfied with very short hours and would not volunteer for or accept new assignments on new machines or that the respondent would not assign the work to him in such circumstances even when other employees were working overtime. It further assumes he would not become competent to do such work. This is an improper assumption.[5] Second, the formula credits the claimant with specific work without any inclusion of general overhead time or, and perhaps more importantly, any showing that a similar analysis would account for all the time actually worked by other employees in the department. Thus, the formula has no control sample to establish its validity. Would the formula have correctly predicated the earnings of other employees in the department? Further, testimony by Respondent's witnesses concerning the assignment of particular work to the claimant and the conclusion that the claimant would not have done or would not have been assigned certain work was clearly opinion evidence and was contested by the backpay claimant. Lastly, as noted in the complicated arguments of the parties on brief regarding the arithmetic significance of the conflicting summaries of business records and other work-related evidence, the quantification of work that would have been assigned the backpay claimant is simply not susceptible to certain resolution on this record. The necessary guess work thus involved in applying the Respondent's formula renders it less accurate than the traditional formula proposed by the General Counsel.

In summary, I find the General Counsel's projected earning backpay formula conventional both in its form and in its application herein. Comparing the formula suggested by the Respondent, howsoever arguably superior in theory, I find on this record it was not susceptible to a clear or certain application. Thus, I have found that the General Counsel's formula produces a gross backpay result which is more accurate than any total reasonably resulting from the application of the Respondent's formula to the conflicting record testimony herein. Accordingly, I accept both the formula and the calculations of the General Counsel as to the gross backpay.

III. THE PENSION CONTRIBUTION ISSUE

The General Counsel alleged in paragraphs 11 and 12 of the backpay specification that the Respondent made weekly pension contributions to a union pension trust fund on behalf of employees in the lithographic preparatory department, that Gerard would have been employed in the preparatory department and therefore that Gerard would have received such contributions. The Respondent denied paragraphs 11 and 12 in its answer as amended and further alleges that it had made payments only to certain employees subject to "a specical agreement" with the Union.

The Board's original Order does not address pension contributions. The Board has held, however, that pension contributions are a proper part of a general make-whole order. *Fruin-Colnon Corp.*, above. Thus, the General Counsel would prevail in this aspect of the case if it proved its assertions as pled. As noted, the Respondent denied that the backpay claimant would have received pension contributions. There was no testimony that other employees received the contributions during the backpay year. Rather the General Counsel contends on brief that the Respondent did not prove the denials contained in its answer. As to gross earnings however, of which pension contributions are part, the burden is on the General Counsel to establish its case. Thus, it is not incumbent upon the Respondent to sustain its denial of the backpay specification allegation; rather it is up to the General Counsel to adduce evidence that its contentions are true.

There was testimony that employee pension contributions were completely discontinued for all employees sometime after the backpay claimant was terminated. The earnings report submitted on a roughly comparable employee to the backpay claimant indicates that his pension contributions ended in the third quarter of 1979, i.e.,

[5] It was the Respondent's termination which has foreclosed the backpay claimant's opportunity to demonstrate fitness for future tasks. The Board utilizes a presumption of performance improvement. Cf. *Flora and Argus Construction Co.*, 149 NLRB 583 (1964); *Kansas Refined Helium Co.*, 252 NLRB 1156 (1980).

on or before August 31, 1979. No more specific dates are evident in the record. Without more, I find that the General Counsel's case on this aspect fails for want of proof. Accordingly, I shall dismiss the pension aspect of the backpay specification.

IV. INTERIM EARNINGS AND ALLEGED FAILURE TO MITIGATE DAMAGES

The General Counsel in the backpay specification, as orally amended at the hearing, alleges certain interim earnings by the claimant which the Respondent does not dispute. The Respondent argues, however, that the backpay claimant failed to mitigate his damages in several ways as discussed further infra.

The Board in *Aircraft and Helicopter Leasing and Sales*, 227 NLRB 644, 646 (1976), approved the following restatement of legal principles regarding mitigation:

> An employer may mitigate his backpay liability by showing that a discriminatee "willfully incurred" loss by "clearly unjustifiable refusal to take desirable new employment." (*Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 199–200 (1941)), but this is an affirmative defense and the burden is upon the employer to prove the necessary facts. *NLRB v. Mooney Aircraft, Inc.*, 366 F.2d 809, 813 (C.A. 5 1966). The employer does not meet that burden by presenting evidence of lack of employee success in obtaining interim employment or of low interim earning; rather, the employer must affirmatively demonstrate that the the employee "neglected to make reasonable efforts to find interim work." *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 576–576 (C.A. 5 1966). Moreover, although a discriminatee must make "reasonable efforts to mitigate [his] loss of income . . . [he] is held . . . only to reasonable exertions in this regard, not the highest standard of diligence." *NLRB v. Arduini Mfg. Co.*, 394 F.2d 420, 422–423 (C.A. 1 1968). Success is not the measure of the sufficiency of the discriminatee's search for interim employment; the law "only requires an honest good faith effort." *NLRB v. Cashman Auto Co. and Red Cab Co.*, 233 F.2d 832, 836 (C.A. 1). And in determining the reasonableness of this effort, the employee's skill and qualifications, his age, and the labor conditions in the area are factors to be considered. *Mastro Plastics Corp.*, 136 NLRB 1342, 1359.

In determining if the backpay claimant made a reasonable search for employment, the entire record must be considered in the context of the claimant's search over the entire backpay period. *Highview, Inc.*, 250 NLRB 549 (1980); *Saginaw Aggregates, Inc.*, 198 NLRB 598 (1972); *Nickey Chevrolet Sales, Inc.*, 195 NLRB 395, 398 (1972). Uncertainties in the evidence are to be resolved against the wrongdoer, *NLRB v. Miami Coca-Cola Bottling Co.*, above.

The uncontradicted testimony of the backpay claimant was that he sought work in his trade by registering for employment with the Union and by calling on printing firms. Further, he engaged in what was ultimately unprofitable self-employment.[6]

The Respondent suggests the backpay claimant should have sought work outside his printing specialty. Given that the claimant was in his final year of his working life—the backpay period ended by his retirement at age 65, I do not find on this record that the backpay claimant's job search was unreasonable or other than diligent.

Considering the testimony of the backpay claimant which I credit both because of the superior demeanor of the witness and because of the absence of contradictory evidence and, on the record as a whole, I find that the backpay claimant made diligent efforts to find employment and that the interim earnings admitted by the General Counsel constitute the only proper interim earning deductions from the gross backpay sums as found above. I further find the Respondent has failed to meet its burden of proof to establish additional deductions from the gross sum.

V. SUMMARY AND CONCLUSIONS

Having found the General Counsel's backpay formula and calculations correct, save for the pension contributions paragraphs rejected above, and having found the interim earnings as pled in the amended backpay specification, I find the backpay claimant is entitled to the sums reflected in the following table:

Year	*Qtr.*	*Gross Backpay*	*Interim Earnings*	*Net Backpay*
1979	III	2,974.58	- 0 -	2,974.58
1979	IV	6,352.23	1,679.68	4,672.55
1980	I	6,327.23	2,221.37	4,105.86
1980	II	6,327.23	3,766.53	2,560.70
1980	III	3,114.94	- 0 -	3,114.94

Total Net Backpay principal: $17,428.63.

On the basis of the foregoing, and pursuant to Section 10(c) of the Act, I issue the following recommended

ORDER[7]

It is hereby ordered that the Respondent, East Wind Enterprises, San Francisco, California, its officers, agents, successors, and assigns, shall forthwith pay to Leonard Gerard the amount listed after his name, plus

[6] The Respondent's efforts to suggest that the backpay claimant had hidden profits or other business revenues were unsuccessful. There is no evidence to suggest that the backpay claimant's business ventures were other than as testified to by him.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[8] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). The specification of earnings by calendar quarter as set forth above shall be used for purposes of interest calculation.

interest to be computed in the manner set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977), and *Olympic Medical Corp.*, 250 NLRB 146 (1980),[8] less tax withholding required by Federal and state laws.

Leonard Gerard	$17,428.63